SUPREME COURT. U. S.

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In the Supreme Court
OF THE
United States

October Term, 1958

No. 656

The City of Los Angeles, a municipal corporation, the City of Long Beach, a municipal corporation, Roger Arnebergh and Walfred Jacobson,

Appellants,

vs.

The Public Utilities Commission of the State of California, and C. Lyn Fox, Peter E. Mitchell, Matthew J. Dooley, Theodore H. Jenner and Everett C. McKrage, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

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THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH and WALHFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

The Public Utilities Commission of the State of California and C. Lyn Fox, Peter E. Mitchell, Matthew J. Dooley, Theodore H. Jenner and Everett C. McKeage,

as members of and constituting the said Public Utilities Commission, appearing herein as appellees, move this Court to dismiss for want of jurisdiction the appeal taken herein to this Court by the City of Los Angeles, a municipal corporation, the City of Long Beach, a municipal corporation, Roger Arnebergh and Walhfred Jacobson, appellants, upon the following grounds:

I. The issue raised by appellants is moot.

II. The appeal does not present a substantial federal question.

III. Appellants cannot invoke the privileges and immunities provisions of the Constitution.

STATEMENT.

Appellants have chosen to appeal from the judgment of the Supreme Court of the State of California denying appellants' petition for writ of review of an *interim* or interlocutory order of appellee Public Utilities Commission of the State of California and the members thereof. While certain increased charges became effective forty days after the date of said order, hearings in the proceeding continued, and, months later, after thorough and protracted hearings, a final order was entered. By the final order of appellee Commission, the interim or interlocutory decision was affirmed and made permanent.

In order to correct any misapprehension which might arise from appellants' statement of facts, the following statement of facts is set forth:

The Pacific Telephone and Telegraph Company filed its application for a general increase in its rates. These included rates for a class of service known as message unit and multiple message unit service in the Los Angeles Extended Area. This area is served not only by Pacific, but by General Telephone Company of California, California Water and Telephone Company and Sunland-Tujunga Telephone Company, each in its own territory. The facilities of all four companies are jointly used to afford interchanged multiple message unit service as a substitute for message toll service (long distance) within the area, and in the interest of uniformity, each company charges the same rates for such service and uses the same distance factors (mileage steps) in making its charges.

Public hearings, after *adequate notice* (see infra, p. 8), were held, commencing on September 25, 1957, at which time the Cities of Los Angeles and Long Beach appeared. Their City Attorneys Roger Arnebergh and Walhfred Jacobson did not appear in their individual capacities at that time. On September 26, the second day of hearing, in the presence of a representative of the City of Los Angeles, but in the absence of the representative of the City of Long Beach, Pacific's counsel stated that it was his company's intention to move for interim relief in conjunction with the three other connecting companies. On September 27, the four companies joined in a motion to decrease the length of the mileage steps which, coupled with a requested increase in the rates, would serve to increase the charges for the multiple message unit service in which they all participate. The mo-

tion was based on a showing that the return on the property dedicated to interchanged multiple message unit traffic for all four of the companies amounted to but 3.45%. Each company also submitted evidence showing that its over-all estimated operations for 1957 would produce the following return at then existing rates:

Pacific	5.97%	California Water and Telephone	5.21%
General	5.89%	Sunland	5.67%

Thereafter and on October 3, 4 and 10, 1957, public hearing on the motion was held. Representatives of appellant municipalities were present and participated therein, except that the City of Long Beach was absent on October 10th. The Presiding Commissioner asked them if they had any evidence to offer in connection with the motion for interim relief, and they replied in the negative. No request for additional time was made. Argument on the motion was had, in which appellant municipalities participated.

Thereafter and on December 10, 1957, the Commission by interim decision decreased the mileage steps for multiple message unit service so as to be identical with those provided for short-haul toll mileage steps, since both types of service have the same general characteristics, but refused any increase in the rate for such service. The decreasing of the mileage steps resulted in increased charges to subscribers effective January 20, 1958, and increased revenue to the four companies.

Petitions for rehearing were filed by the appellant cities, and *appearing in their individual capacities for*

the first time, by appellants Roger Arnebergh and Walhfred Jacobson. The petitions were denied.

Before the increases became effective, the Commission by Decision No. 56109 (56 Cal. P.U.C. 140) ordered that the four companies involved keep appropriate records to reflect the increases of rates paid to them by their customers pursuant to the interim decision complained of, to the end that refunds of such increases might be made to customers with interest should the California Supreme Court or any other court of competent jurisdiction annul the Commission's interim decision.

Thereafter the Cities of Los Angeles and Long Beach, and Roger Arnebergh and Walhfred Jacobson as individuals, petitioned the California Supreme Court for writ of review, which was denied without opinion. (50 Advance California Reports, No. 8, Minutes p. 2.)

Although it is only from this denial that appellants take this appeal, appellees, in order to put the matter in its proper frame of reference before this Court, desire to point out that between September 27, 1957, when the motion for interim relief was made by the telephone companies, and March 6, 1958, the date on which the entire proceeding was finally submitted subject to oral argument and written briefs, 28 days of public hearing were had. Between the dates of October 10, 1957, when argument on the motion for interim relief was concluded, and March 6, 1958, the date on which the entire proceeding was finally submitted subject to oral argument and written briefs, there were 25 days of public hearing. Between December 10, 1957, the date of the interim decision complained of, and March 6, 1958, 21 days of public hearing were held.

Any interested party had the opportunity to appear and be heard, and the City of Los Angeles, at least, was represented at each hearing, examined any witness it chose, introduced evidence on its own behalf and participated in oral argument and the filing of briefs. The City of Long Beach was represented at several of such hearings and participated therein.

No evidence was introduced at any time by either of appellee individuals.

A petition for rehearing filed by the City of Los Angeles and its City Attorney in his individual capacity was filed and denied; they then petitioned the Supreme Court of the State of California for a writ of review of that portion of the Commission's *final* decision which affirmed and ratified the interim decision. This also was denied without opinion. (51 Advance California Reports, No. 6, Minutes, p. 2.) Appellees here seek review only of the denial by the Supreme Court of the State of California of their petition for writ of review of the interim or interlocutory decision.

ARGUMENT.

I.

THE ISSUE RAISED BY APPELLANTS IS MOOT.

By appealing only from the denial by the California Supreme Court of writ of review of the Commission's interim decision, appellees seek to contain the consideration of this Court within narrow confines indeed. However, they cannot avoid the fact, as set forth in the foregoing

statement of facts, that between September 27, 1958, when the motion for interim relief was made by the four telephone companies, and March 5, 1958, the date of submission of the proceeding, 28 days of public hearing were had. Between October 10, 1957, when argument on the motion was concluded, and the date of submission of the entire proceding, there were 25 days of public hearing. Between December 10, 1957, the date of the interim decision complained of, and the date of final submission, there were 21 days of public hearing. After all of these days of hearing, appellee Commission by its final decision, after the receipt of additional evidence, found that the rate relief granted by its interim decision was justified, and affirmed it and made it permanent. (Decision No. 56652; 56 Cal. P U.C. 277, 23 P.U.R. 3d 209.)

Thus the interim decision has become merged in the final decision and there are no existing facts or rights arising out of the interim decision which remain undetermined by the final decision. Even if this Court for any reason were to overrule the California Supreme Court, which would have the effect of annulling the Commission's interim decision, the final decision of the Commission *in the same case* would still remain, and the final decision of the California Supreme Court denying review thereof *on the same issues* would still remain.

The issues raised by appellants in their appeal from the denial by the California Supreme Court to review of the Commission's interim decision are therefore moot.

II.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Entirely apart from being moot, (which of itself denies the substantiality of any federal question) the appeal presents no substantial federal question. The burden of appellants' complaint is that they "and those they represent as affected telephone subscribers" (Jurisdictional Statement, p. 3) have been deprived of their properties by State action without due process of law. This is predicated upon two propositions:

A. That they had not received due or adequate notice of hearing.

B. That the Commission's interim decision was rendered without full hearing.

A. Appellants Received Adequate Notice Although They Have No Constitutional Right Thereto.

As to the first proposition, the facts are that upon the filing of the application by Pacific for a general rate increase, (which included both the proposed shortening of the mileage steps subsequently authorized and the increase in the message unit rate subsequently refused by the Commission's interim decision) the following notice was given:

State officials, boards of supervisors of 51 California counties and the mayor of each city in California served by applicant, totaling 249, were notified of the filing of the application by Pacific, and advised that copies of the application, associated exhibits and proposed written testimony and accompanying exhibits could be obtained

upon request therefor. Notice of hearing was mailed by the Commission to certain state officials, the League of California Cities, County Supervisors' Association of California, District Attorneys' Association of California, California Farm Bureau Federation, California Independent Telephone Association, California Manufacturers Association, California State Grange, General Services Administration of the United States Government, Board of Public Utilities and Transportation of the City of Los Angeles, City Attorney and Chief Rate Engineer of the City and County of San Francisco, Telephone Answering System and Services of California, Army, Navy and Executive Agencies of the United States Government, all telephone companies in California, and certain individual subscribers. Also, the applicant was directed by appellee Commission to mail, and did mail, a copy of the notice of hearing to the Board of Supervisors and the District Attorney of each of the California counties served by applicant, and the Chief Administrative Officer and the City Attorney of each California city in which applicant rendered telephone service. In addition, applicant was required to and did publish notices of the filing of its application in approximately 239 California newspapers, including 71 in Southern California.

As a consequence, appellees assume, of the receipt of such notice, both of the appellant municipalities filed written appearances. Appellant City of Los Angeles appeared throughout the entire proceeding, and actively participated therein. Appellant City of Long Beach attended such hearings as it chose, and as a party, was mailed a notice of the date and place of every continued hearing.

Had the representative of the City of Long Beach chosen to appear on the second and third days of hearing, he, as well as the representative of the City of Los Angeles, would have been present when the four companies gave notice of their intention to move and thereafter made their motion for interim relief. As stated in the statement of facts, both municipalities participated in subsequent hearings on the motion and in argument on the motion.

A party who is actually present at a proceeding cannot urge that he had no notice of it, nor that notice was inadequate. (*United States v. Miller* (1943), 317 U.S. 369, 382, 87 L. ed. 336, 347; *Doty v. Love* (1935), 295 U.S. 64, 74, 79 L. ed. 1303, 1310.)

Moreover, appellant municipalities were afforded an opportunity to be heard. (See Statement herein, p. 2.)

As stated by this Court in *Market Street Railway Co. v. Commission,* 324 U.S. 548, 559, 89 L. ed. 1171, 1180:

> "But even if a more convincing showing were made that the Company had relevant evidence to be heard, we find no adequate excuse for the failure to offer it in the proceeding. No offer was rejected, no request for time to obtain such evidence was denied. A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights."

As stated hereinbefore, appellants Roger Arnebergh and Walhfred Jacobson, who are the City Attorneys of the respective appellant municipalities, did not appear *in their individual capacities* until they joined *for the*

first time with the cities they represent in filing a petition for rehearing of the Commission's interim order. Having designated their assistants to represent the cities, it can scarcely be gainsaid that they, as individuals, had *actual notice* of the proceedings.

The claimed lack of notice is absolutely specious. Even if it had any merit, it would not present a substantial federal question. Public utility regulation was, historically, a legislative function. Rates of such utilities were fixed by the action of a state legislature or governing body of a city, and embodied in a statute or city ordinance. Whenever rates were changed, they were changed by the same process, i.e., legislative act. Individual citizens could not properly claim that they were constitutionally guaranteed notice or hearing when their own representatives enacted laws fixing or increasing rates. When regulatory commissions came into being as agents of the state, they continued to perform a legislative function in the same area. This Court has held that the prescription of public utility rates by a regulatory commission constitutes legislative action. (*Colorado Interstate Gas Co. v. Federal Power Commission,* 324 U.S. 581, 589, 590, 89 L. ed. 1206, 1216.)

While the California legislature might amend the Public Utilities Act of this State so as to require notice to each individual customer of a utility, it has not done so, but has followed the uniform rule prevailing throughout the United States. (*Clemmons v. Railroad Commission,* 173 Cal. 254, 257-258; Sec. 1707, California Public Utilities Code; *United States v. Merchants, etc. Assn.,* 242 U.S. 178, 188, 61 L. ed. 233, 239.)

This Court has considered this matter on a number of occasions and has decided contrary to the contention of appellants. The case of *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 110-115, 81 L. ed. 540, 542-545, is a good illustration. There, this Court pointed out that even a contract customer, who enjoyed a rate based upon a long-term contract entered into long before the state regulatory statute was enacted, had no right to notice or hearing as a condition precedent to the increasing of such contract rate. The decision in this case is relatively brief and a reading of it completely demolishes any thought that there is a constitutional right to notice and hearing. The *Midland* case was referred to approvingly by this Court in the very recent case of *United Gas Pipe Line Company v. Mobile Gas Service Corporation, et al.*, 350 U.S. 332, 337-338, 100 L. ed. 373, 383. The case of *Wichita Railroad & Light Co. v. Public Utilities Commission of Kansas*, 260 U.S. 48, 67 L. ed. 124, strongly relied upon by appellants as supporting their contention, gives them no support whatsoever and is no authority for the contention that a customer of a utility, either contract or non-contract customer, has a constitutional right to notice and hearing as a condition precedent to the lawful increase of the rates of a public utility. The later *Midland* case destroys any possible dicta that appears in the *Wichita* case, and the *United Gas Pipe Line Company* case clearly points out that all that the *Wichita* case did was to construe the requirements of a state statute and that the decision in the *Wichita* case was based purely upon statutory construction. (350 U.S. 332, 346, 100 L. ed. 373, 387.)

It is difficult to perceive any application of the case of *Hollis v. Kutz*, 255 U.S. 452, 65 L. ed. 727, to appellants' assertion that the case at bar presents a substantial federal question. This Court there found that gas consumers were not entitled to equal protection of the laws as against the right of the government to receive lower rates. The Court also interpreted the terms of a statute, and found that consumers might appeal upon their supposed constitutional ground without first having filed a formal complaint for hearing before the Commission.

B. The Interim Decision Did Not Violate Appellants' Constitutional Rights.

In California, a public utility may not increase its rates without a showing before the Commission and a finding by the Commission that such increase is justified. (Sec. 454, Public Utilities Code.) In this, California is different from the Federal jurisdiction and most State jurisdictions. In the Federal jurisdiction and in most State jurisdictions, a public utility is lawfully entitled to file a schedule of increased rates with the appropriate regulatory body and, unless the regulatory body suspends the effectiveness of such increased rates, they go into effect, usually, within thirty days. After the expiration of thirty days the increased rates become the legal rates which the customer must pay, although he has had no opportunity to be heard concerning the increase. No one may claim that this procedure is unlawful. This procedure is to be found in the Interstate Commerce Act, the Federal Power Act, the Federal Communications Act, and the Civil Aeronautics Act, and in several other Federal

statutes. The same procedure will be found in the law of, probably, a majority of the states. If the regulatory body refuses to suspend the increased rates, such action on the part of the regulatory body is not subject to judicial review. (*Carlsen v. United States* (3-Judge U.S. District Court), 107 Fed. Supp. 398, 399.)

In light of the foregoing history and unmistakable facts of regulatory procedure and the utter absence of any authority to the contrary, it is obvious that the rendering of an interim decision by appellee Commission pending full hearing, *which full hearing was thereafter held, resulting in a final decision which found that the interim increases were justified* AND OF WHICH FINAL DECISION APPELLANTS VOICE NO COMPLAINT, violated no constitutional right of appellants.

III.

APPELLANTS CANNOT INVOKE THE PRIVILEGES AND IMMUNITIES PROVISIONS OF THE CONSTITUTION.

Appellant municipalities, the Cities of Los Angeles and Long Beach, state (Jurisdictional Statement, p. 12) that:

> "In the proceedings below the appellant cities appeared in behalf of industrial, commercial and residential subscribers within their boundaries and in effect in behalf of all of the subscribers in the Los Angeles area who would otherwise have been without representation."

In the proceedings before the appellee Commission, appellant municipalities appeared on behalf of their respec-

tive cities only. As stated hereinbefore, appellant individuals appeared only after the rendition of the interim decision complained of, hence there was no evidence before appellee Commission that they would be individually affected in any way by the decision.

Appellees respectfully submit that (A) appellant municipalities and (B) appellant individuals have no right to invoke the privileges and immunities provisions of the Constitution.

A. The Appellant Cities.

Municipal corporations and political subdivisions established by a state for the government of its people are creatures of the state, whose power over them is not restrained by the provisions of the Fourteenth Amendment. (*Risty v. Chicago, R. I. & P. R. Co.,* 270 U.S. 378, 70 L. ed. 641.) They have no privileges or immunities which they may invoke against their creator (*Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 77 L. ed. 1015) in respect of either their governmental or their proprietary activities. (*Pederson v. Portland,* 144 Ore. 437, 24 P. (2d) 1031.) As the appellee Public Utilities Commission is the agent of the State in the performance of the legislative duty of ratemaking, this principle of law applies to its legislative determinations. (*R.R. Commission v. Los Angeles R. Co.,* 280 U.S. 145, 156, 74 L. ed. 234, 329.)

While appellee Commission welcomes the appearance of municipal representatives and values their undoubted contributions to proceedings before it, it cannot acquiesce

in the assertion that such appearance confers any of the Federal constitutional privileges or immunities upon municipalities.

As to the assertion that the municipalities appear in behalf of "industrial, commercial and residential subscribers within their boundaries" (Jurisdictional Statement, p. 12) this Court has often ruled that one may not claim standing before it to vindicate the constitutional rights of some third party unless he shows that he himself is injured by the action complained of. Even though he does show a direct, substantial injury from application of a statute, this Court reiterated that he cannot challenge its validity unless he can show that he is within the class whose constitutional rights are allegedly infringed. This rule, this Court has said, is salutary and the Court's practice of adherence thereto should be followed except in such case where it would be difficult if not impossible for the persons whose denial of constitutional rights is asserted to present their grievance before any court, and if there is need to protect their fundamental rights. (*Barrows v. Jackson* (1952), 346 U.S. 249, 255-258, 97 L. ed. 1586, 1594-1597.)

Quite obviously, the instant proceeding does not come within the exceptions to this "salutary rule". No showing whatever was made that the municipalities would suffer a "direct, substantial injury" nor that "they are within the class whose constitutional rights are allegedly infringed", nor that the persons whose constitutional rights the municipalities seek to urge cannot assert their own grievances, nor that the constitutional rights of such persons need to be protected.

The statement that without the representation of the cities "all of the subscribers in the Los Angeles area . . . would otherwise have been without representation" (Jurisdictional Statement, p. 12) is erroneous.

By law, the California Public Utilities Commission has the obligation of protecting the public interest. (*Sale v. Railroad Commission*, 15 Cal. 2d 612, 617-618, 104 P. 2d 38, 41-42; *Hanlon v. Eshleman*, 169 Cal. 200, 202, 146 Pac. 656, 657; *Pac. Tel. and Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119.)

This Court has stated on numerous occasions that regulatory agencies protect the public interest.

> ". . . it is only necessary to say that the commission represents the public and especially the subscribers, and they are properly bound by the decree." (*Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 592, 70 L. ed. 747, 749.)

In a proceeding involving the Interstate Commerce Commission, this Court declared:

> "The carrier is the only necessary party to the proceeding under § 4. The Commission represents the public." (*United States v. Merchants etc. Assn.*, 242 U.S. 178, 188, 61 L. ed. 233, 239.)

B. The Appellant Individuals.

The appellant individuals have no standing to assert any denial of constitutional rights herein.

The appellant individuals did not appear in the proceedings before appellee Commission until they joined, in their individual capacities, with the cities they represent as City Attorneys in filing a petition for rehearing of

the herein assailed decision with the appellee Commission. Therefore the record is devoid of any showing that they are affected in any way whatever by the interim decision which allegedly denies their constitutional rights.

This Court has ruled that such a showing is an essential condition precedent to the assertion of a claim of violation of constitutional right. In *Bode v. Barrett,* 344 U.S. 583, 585, 97 L. ed. 567, 570, we find:

> "No showing has been made by any of the appellants that the tax bears no reasonable relation to the use he makes of the highways . . . No effort is made to show that in that way or in some other manner the tax is increased by reason of the interstate operations of any appellant. In short *appellants have failed to carry the burden* of showing that the tax deprives them of rights which the Commerce Clause protects. (Citing cases.)" (Emphasis supplied.)

On page 586, we further find:

> "Appellants make other arguments to the effect that the statute is so inconsistent, vague, and uncertain in its classification as to violate the Equal Protection Clause of the Fourteenth Amendment. But even if we assume that the vagaries of the law reach that dignity, *no showing is made* that any of the appellants is the victim of an invidious classification. (Citing cases.)" (Emphasis supplied.)

CONCLUSION.

Appellees respectfully move that the appeal herein be dismissed, since the issue raised by appellants is moot, since the appeal does not present a substantial federal question, and since appellants cannot invoke the privileges and immunities provisions of the Constitution.

Dated, San Francisco, California,
February 16, 1959.

Respectfully submitted,

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